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## COTTROL'S FAILED RESCUE MISSION

RAOUL BERGER\*

An activist remarked in 1983 that replying to Raoul Berger's *Government by Judiciary* (1977) has become a "cottage industry."<sup>1</sup> In fact it has become a rite of passage: neophyte law professors prove themselves by attempting to rescue legal history from Berger's toils. Robert Cottrol is the latest to enter the lists, bearing a shield emblazoned with the bold motto: "Static History and Brittle Jurisprudence: Raoul Berger and the Problem of Constitutional Methodology."<sup>2</sup> His prior efforts to document "American Apartheid"<sup>3</sup> lead him to read constitutional history through black-colored lenses, a fresh illustration of Paul Brest's plea to his fellow-activists "simply to acknowledge that most of our writings are not political theory but advocacy scholarship — amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good."<sup>4</sup> Not satisfied that my "perceptive" critics, whom he frequently cites,<sup>5</sup> have adequately exploded my history,<sup>6</sup> he repeats their stale canards, taking no account of my detailed refutations,<sup>7</sup> still less calling them to the attention of his readers. Yet he charges me with "crucial sins of

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<sup>1</sup> Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 753 (1983).

<sup>2</sup> 26 B.C.L. REV. 353 (1985) [hereinafter cited as Cottrol].

<sup>3</sup> *Id.* at 376-77, 370-71 nn.182-83.

<sup>4</sup> Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981). Activist writings, Mark Tushnet observes, are "plainly designed to protect the legacy of the Warren Court." Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 811 (1983).

<sup>5</sup> Aviam Soifer is "one of Berger's more perceptive critics." Cottrol, *supra* note 2, at 366. For light on Soifer's "perceptiveness," see Berger, *Soifer to the Rescue of History*, 32 S.C.L. REV. 427 (1981).

<sup>6</sup> As Eric Foner wrote of a similar controversy, the criticized thesis "remains important precisely because a generation of scholars has directed its energies to overturning it." N.Y. Times, May 23, 1982, § 7 (Book Review), at 27, col. 1.

<sup>7</sup> Michael Perry considers that they were "generally effective rebuttals" of the historical criticisms. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285 n.100 (1981). "Many of Berger's critics," Cottrol writes, "have been too willing to concede his essential historical accuracy." Cottrol, *supra* note 2, at 354 n.12. Cottrol essays to prove them wrong, but as Sanford Levinson, a fellow activist, wrote of attempts to construct a defense of the modern cases, "it is naive to pretend that the construction will be an easy task or that we can so easily shed the view of the Constitution, and its limits, articulated by Berger." Levinson, Book Review, 236 NATION 248, 250 (Feb. 26, 1983) (reviewing R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982)).

omission, the ignoring of evidence damaging to Berger's thesis";<sup>8</sup> but, as will appear, I am more sinned against than sinning.

He maintains that my conclusion that the "minimal guarantees of the Civil Rights Act of 1866 reflected the limited egalitarian agenda of the Thirty-ninth Congress is at sharp variance with the historical record."<sup>9</sup> He himself notices that

[c]hampions of equal rights were painfully aware of the Civil Right Act's limitations. The law specified in detail the rights bestowed: the right to own and dispose of property, the right to make contracts, the right to testify in court. It was a *catalogue of minimal rights* long denied blacks in most states.<sup>10</sup>

This need not rest on Cottrol's concession. The Supreme Court stated in *Georgia v. Rachel*:

The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights . . . . [T]he Senate bill did contain a general provision forbidding "discrimination in civil rights or immunities" preceding the specific enumeration of rights . . . . Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general . . . . [A]n amendment was accepted [in House] striking the phrase from the bill.<sup>11</sup>

The deletion was made at the insistence of John Bingham, the draftsman of the fourteenth amendment, in order to render it less "oppressive,"<sup>12</sup> noting that "with some few exceptions every State in the Union does make some discrimination . . . in respect of civil rights on account of race or color."<sup>13</sup> Hence Bingham stated that the "no discrimination" sentence "must be stricken out or the Constitutions of the States are to be abolished by your act . . . ."<sup>14</sup> This was the Bingham who, Cottrol indicates, "had far reaching purposes, a desire to bring about a political and social equality far in excess of what, in 1866, was politically feasible!"<sup>15</sup> Nowhere does Cottrol pause to ask: why did Bingham suddenly embrace in the fourteenth amendment what he found "oppressive"

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<sup>8</sup> Cottrol, *supra* note 2, at 365.

<sup>9</sup> *Id.* at 370.

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> 384 U.S. 780, 791-92 (1966). Yet Cottrol states, "[t]hat act, according to Berger, was designed to confer a specific set of civil rights on the freedmen." Cottrol, *supra* note 2, at 356 (emphasis added). He cannot bring himself to acknowledge unassailable facts, a tactic he employs throughout.

<sup>12</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Alexander Bickel correctly concluded that "Bingham, while committing himself to the need for safeguarding by constitutional amendment the specific rights enumerated in the body of section 1 [of the act], was anything but willing to make a similar commitment with respect to 'civil rights' in general." Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 24 (1955).

The chairman of the House Judiciary Committee, James Wilson, explained that the deletion was made because "some gentlemen were apprehensive that the words we propose to strike out might give rise to a latitudinarian construction not intended," and to obviate any "construction beyond the specific rights named in the section." CONG. GLOBE, 39th Cong., 1st Sess. 1366-67 (1866).

<sup>15</sup> Cottrol, *supra* note 2, at 357.

in the Act; why did what was "politically [un]feasible" in the Act abruptly become "feasible" in the amendment which was travelling on a parallel track?<sup>16</sup>

In fact the framers deemed section one of the amendment to be "identical" with that of the Act, the purpose of the amendment being to remove doubts as to the constitutionality of the Act and to protect it from repeal by a subsequent Congress.<sup>17</sup> From this there was no dissent. "Over and over in this debate," Charles Fairman observed, "the correspondence between Section I of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other."<sup>18</sup> Harry Flack, a broad constructionist, said of the amendment, "nearly all said it was but an incorporation of the Civil Rights Bill . . . . [T]here was no controversy or misunderstanding as to its purpose or meaning."<sup>19</sup> Contemporary with adoption of the amendment, Justice Bradley declared in 1870, "the first section of the bill covers the same ground as the fourteenth amendment . . . ."<sup>20</sup> Yet Cottrol suggests that the amendment extended "further protection to blacks,"<sup>21</sup> taking no notice of such facts, though they support my view that "the minimal guarantees of the Civil Rights Act reflect the limited egalitarian agenda of the Thirty-ninth Congress."<sup>22</sup>

Those limited goals are confirmed by the framers' denial of suffrage to the blacks. Cottrol notices that the framers' treatment of suffrage is "an important indicator" of the framers' "views on the broader question of black equality . . . . They knew what was at stake. The right to vote was necessary to protect other rights."<sup>23</sup> There is no need to recapitulate my documentation for the framers' rejection of a ban on discrimination with respect to suffrage.<sup>24</sup> Let it suffice that Justice Harlan's own masterly sifting of the historical facts led him to affirm that the argument for reapportionment flew "in the face of irrefutable and still unanswered history to the contrary."<sup>25</sup> Commentators agree.<sup>26</sup> The history of the fifteenth amendment discloses that it was enacted in order to fill the gap left by the fourteenth.<sup>27</sup> And in a decision contemporary with it, the Supreme Court

<sup>16</sup> Bingham was keenly aware that "justice for all is not to be secured in a day." R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 111 (1977). "Historical reconstruction must at least account for the evidence that is discrepant, and must explain how the rejected testimony came to exist." H. BUTTERFIELD, *GEORGE III AND THE HISTORIANS* 225 (rev. ed. 1969).

<sup>17</sup> R. Berger, *supra* note 16, at 23. Cottrol's carelessness in stating my position is illustrated by his statement that "For Berger . . . the sole purpose of the fourteenth amendment was to remove doubts concerning the constitutional legitimacy of the Civil Rights Act of 1866." Cottrol, *supra* note 2, at 355 (emphasis added).

<sup>18</sup> Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5, 44 (1949).

<sup>19</sup> H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 81 (1908); for confirmatory evidence see R. BERGER, *supra* note 16 at 23.

<sup>20</sup> *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8,408).

<sup>21</sup> Cottrol, *supra* note 2, at 370.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 370-71.

<sup>24</sup> See R. BERGER, *supra* note 16, at 52-68.

<sup>25</sup> *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

<sup>26</sup> For citations, see Berger, *The Activist Legacy of the New Deal Court*, 59 *WASH. L. REV.* 751, 758 (1984).

<sup>27</sup> For citations see Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 *Nw. U.L. REV.* 311, 318-22 (1979).

declared that before adoption of the fifteenth amendment a State could "exclude citizens of the United States from voting on account of race . . . . [T]he amendment has invested the citizens of the United States with a new constitutional right . . . ." <sup>28</sup>

Cottrol does not dispute these incontrovertible facts; instead he muddies the waters in an effort to expose Berger's "fatally" limited, "historical sensibility too narrowly focused," vision.<sup>29</sup> Exhibit 1 is my neglect of the grant of suffrage in 1866 to black men in the District of Columbia.<sup>30</sup> That in no wise detracts from Congress' refusal to interfere with the States' control of suffrage within their own borders, the central issue.<sup>31</sup> Then Cottrol relies on section two of the amendment, which provides that a State may be denied representation in the House in proportion to its denial of suffrage on racial grounds. Cottrol argues that this indicates the "framers' support for black suffrage," "clear support for black suffrage."<sup>32</sup> Manifestly this leaves a State free to discriminate, albeit at the cost of a proportional diminution of representation. Employing an oft-repeated shoddy tactic, he states, "*Berger argues* that the real motive was to insure Republican hegemony by reducing Southern representation,"<sup>33</sup> as if this was Berger's exclusive prepossession. But such were the sentiments of the framers; throughout I rely on their words, not on my own. It was more important, Senator George Williams of Oregon, a member of the Joint Committee on Reconstruction, candidly avowed, to limit Southern representation than to provide "that negroes anywhere should immediately vote."<sup>34</sup> A leading historian of Reconstruction, C. Vann Woodward, wrote that section 2 "was not primarily devised for the protection of Negro rights and the provision of Negro equality. Its primary purpose . . . was to put the southern states" under northern control.<sup>35</sup> The historical facts bear him out. Thaddeus Stevens, on whom Cottrol relies, said at the outset that the Southern States "ought never to be regarded as valid States, until the Consitution shall be amended . . . as to secure perpetual ascendancy" to the Republican party.<sup>36</sup> The effect of section 2, he said,

will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government . . . . True it will take two, three, possibly five years before they conquer their prejudices sufficiently to allow their late slaves to become their equals at the polls. That short delay would not be injurious. In the meantime the freedmen would become more enlightened, and more fit to discharge the high duties of their new condition.<sup>37</sup>

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<sup>28</sup> *United States v. Reese*, 92 U.S. 214, 217-18 (1876).

<sup>29</sup> Cottrol, *supra* note 2, at 354.

<sup>30</sup> *Id.* at 371.

<sup>31</sup> Such examples presumably are meant to bolster Cottrol's charge that "Berger's view of the history of the fourteenth amendment suffers from an overly narrow focus . . . . Myopia, unfortunately, is not Berger's sole deficiency as an historian." *Id.* at 365. He has yet to learn a first rule: omit the irrelevant.

<sup>32</sup> *Id.* at 358, 372.

<sup>33</sup> *Id.* at 358 (emphasis added).

<sup>34</sup> CONG. GLOBE, 39th Cong., 1st Sess. app. 94 (1866).

<sup>35</sup> R. BERGER, *supra* note 16, at 53.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

In truth Stevens preferred the reduction of representation to an "immediate declaration" that "would make them all voters"; he did not "want them to have the right of suffrage" until they had been educated in "their duties . . . as citizens."<sup>38</sup>

Here as elsewhere Cottrol resolutely shuts his eyes to the historical facts. Blaine of Maine stated: "The effect contemplated . . . is perfectly well understood, and on all hands frankly avowed. It is to deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, [each voteless black counted for 3/5 of a voter] so long as that people shall be denied political rights."<sup>39</sup> The Joint Committee on Reconstruction reported:

By an original provision of the Constitution, representation is based on the whole number of free persons in each State, and three-fifths of all other persons. When all become free, representation for all necessarily follows. As a consequence the inevitable effect of the rebellion would be to increase the political power of the insurrectionary States . . . . The increase of representation necessarily resulting from the abolition of slavery, was considered *the most important element* in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative.<sup>40</sup>

Hence section 2. Whether section 2 was designed to prod the States does not alter the fact that the framers *did not require* a halt to discrimination with respect to suffrage. They left its control to the States — the issue I addressed and Cottrol does not.

#### I. EQUALITY AND THE FOURTEENTH AMENDMENT

Cottrol's treatment of the fourteenth amendment exhibits the tyro's naive identification of his predilections with the aims of the framers, violating the elementary canon not to "impos[e] upon the past a creature of our own imagining."<sup>41</sup> Where Berger "offers a limited view of the equal protection clause,"<sup>42</sup> Cottrol states in the same breath that the framers "probably did not plan to abolish school segregation. They did, however, intend to establish equality of treatment before the law. That was their overriding purpose . . . ."<sup>43</sup> He asserts that they "embraced an ideal of human equality . . . an ideal they successfully wrote into the nation's fundamental law."<sup>44</sup> He cannot perceive that his "ideal of human equality" is at war with their exclusion of suffrage — the quintessential right — and of segregation. He sees only what his passionate thesis dictates, turning his back on the fact that the framers *repeatedly rejected proposals to ban ALL discrimination*.<sup>45</sup> So too, he shuts his eyes to the regret expressed by the chairman of the Joint Committee, Senator William Fessenden, that "we cannot put into the Constitution, owing to existing

<sup>38</sup> R. BERGER, *supra* note 16, at 67.

<sup>39</sup> *Id.* at 66.

<sup>40</sup> REPORT OF THE JOINT COMMITTEE, No. 112, June 8, 1866, p. 3, reprinted in A. AVINS, *THE RECONSTRUCTION AMENDMENTS DEBATES* 94 (1967) (emphasis added).

<sup>41</sup> Richardson & Sayles, *Parliaments and Great Councils in Medieval England*, 77 L.Q. REV. 213, 224 (1961).

<sup>42</sup> Cottrol, *supra* note 2, at 360.

<sup>43</sup> *Id.* at 375.

<sup>44</sup> *Id.* at 373.

<sup>45</sup> R. BERGER, *supra* note 16, at 163–65.

prejudices and existing institutions, an entire exclusion of all class distinctions."<sup>46</sup> Stevens, who early in the session had proposed that "[a]ll laws . . . shall operate . . . equally on all persons,"<sup>47</sup> confessed at the close that he had hoped to remove "every vestige of . . . inequality of rights . . . that no distinction would be tolerated . . . . This bright dream has vanished . . . we shall be obliged to be content with patching up the worst portions of the ancient edifice,"<sup>48</sup> namely with reinforcing the three Civil Rights Act specifics. Throughout the debates on the Act, which the framers considered to be "identical" with the first section of the amendment, they associated equal protection with this narrow group of rights. One example must suffice: Samuel Shellabarger of Ohio said, "whatever rights *as to each of these enumerated civil* (not political) matters the State may confer upon one race . . . shall be held by all races in equality . . . . It secures . . . *equality of protection in these enumerated civil rights*."<sup>49</sup> Cottrol, who accuses me of "crucial sins of omission," of "ignoring of evidence damaging to Berger's thesis," of "failure . . . to explore evidence contrary to his thesis,"<sup>50</sup> nowhere adverts to these devastating *facts*.

Instead he wanders in an analytical fog. The draftsmen, he notes, knew "almost nothing concerning equality before the law:"<sup>51</sup>

In the vast majority of states, blacks, even if free, were decidedly unequal before the law . . . . There was little experience based on a presumption of legal equality between the races to inform the framers of the fourteenth amendment of all the necessary implications of the revolutionary doctrine they were developing.<sup>52</sup>

Why were the framers jettisoning experience in favor of a "revolutionary doctrine"? As Chief Justice Marshall stated, "an opinion which is . . . to establish a principle never before recognized, should be expressed in plain and explicit terms."<sup>53</sup> In fact this attribution of "revolutionary" purpose is a creature of Cottrol's own imagining. Vann Woodward observes that popular convictions "were not prepared to sustain" a commitment to equality.<sup>54</sup> An Illinois Radical, John Farnsworth, stated in the Thirty-ninth Congress that "'Negro equality' is the everlasting skeleton which frightens some people."<sup>55</sup> Indeed, wrote David Donald, "the suggestion that Negroes should be treated as equal to white men woke some of the deepest and ugliest fears in the American mind."<sup>56</sup> Against this background, attribution to the framers of a "revolutionary" shift from "inequality" is the rankest wishful thinking.

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<sup>46</sup> *Id.* at 164.

<sup>47</sup> *Id.* at 163.

<sup>48</sup> *Id.* at 173. In the teeth of the framers' rejection of a ban on *all* discrimination, of Fessenden's and Stevens's regret that the amendment did not ban all distinction, Cottrol urges that "the amendment's general language was designed to allow for an evolution of approach," in the words of opponents, "designed to permit broad construction." Cottrol, *supra* note 2, at 375.

<sup>49</sup> R. BERGER, *supra* note 16, at 170 (emphasis added).

<sup>50</sup> Cottrol, *supra* note 2, at 365, 386.

<sup>51</sup> *Id.* at 375.

<sup>52</sup> *Id.* at 376.

<sup>53</sup> *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693).

<sup>54</sup> C.V. WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 83 (1960).

<sup>55</sup> CONG. GLOBE, 39th Cong., 1st Sess. 204 (1866).

<sup>56</sup> D. DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 157 (1970).

## II. RACISM

Cottrol's comment that "[a] significant failure in Berger's discussion of the fourteenth amendment lies in his treatment of northern racism"<sup>57</sup> betrays his analytical astigmatism. As usual, he ignores the factual materials I spread before him and sets out on a frolic of his own. He has yet to learn that it does not suffice to set out an opposing line of cases, that the judge desires to know how a party reconciles those cases with those of his opponent. To begin with his own "cases," Lincoln's "very real racism" which "has served to obscure . . . his genuine anti-slavery idealism."<sup>58</sup> One can be against slavery and yet remain racist. Cottrol dwells on Lincoln's "cautious growth toward a qualified egalitarianism."<sup>59</sup> For example, "In 1862, Lincoln informed a black audience that colonization represented the optimal solution to the American racial dilemma . . . . By the end of his career, he had come to the conclusion that colonization was impossible."<sup>60</sup> That a proposed "solution" proves impossible does not demonstrate the disappearance of racism. But let Lincoln speak for himself: a delegation of Negro leaders had called on him at the White House, and he told them,

"There is an unwillingness on the part of our people, harsh as it may be, for you free colored people to remain with us . . . . [E]ven when you cease to be slaves, . . . you are yet far removed from being placed on an equality with the white race . . . . I cannot alter it if I would. It is a fact."<sup>61</sup>

And, as will appear, it remained the fact in the Thirty-ninth Congress.

Cottrol stresses "the increased support gained for the abolitionist cause during the Civil War."<sup>62</sup> Certainly the North became determined to put an end to slavery. But "even abolitionists," wrote William Brock, an English observer, "were anxious to disclaim any intention of forcing social contacts between the races . . . ."<sup>63</sup> Derrick Bell, a black academician, wrote, "few abolitionists were interested in offering blacks the equality they touted so highly."<sup>64</sup> A recent Reconstruction historian, Philip Paludan, states that racism was "as pervasive during Reconstruction as after. Americans clung firmly to a belief in the basic inferiority of the Negro race, a belief supported by a preponderance of nineteenth-century scientific evidence."<sup>65</sup> The letters and diaries of Union soldiers, Woodward notes, reveal an "enormous amount of antipathy towards Negroes."<sup>66</sup> The undeniable fact is, as David Donald states, that racism "ran deep in the North."<sup>67</sup>

<sup>57</sup> Cottrol, *supra* note 2, at 366.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 367.

<sup>61</sup> C.V. WOODWARD, *supra* note 54, at 81.

<sup>62</sup> Cottrol, *supra* note 2, at 368 n.165.

<sup>63</sup> W. BROCK, *AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION* 286 (1963).

<sup>64</sup> Bell, Book Review, 76 COLUM. L. REV. 350, 358 (1976). He adds, "the anguish most abolitionists experienced as to whether slaves should be granted social equality as well as political freedom is well documented." *Id.*

<sup>65</sup> P. PALUDAN, *A COVENANT WITH DEATH* 54 (1975). "A belief in racial equality," said W.R. Brock, "was an abolitionist invention. . . . [T]o the majority of men in the mid-nineteenth century it seemed to be condemned both by experience and by science." W. BROCK, *supra* note 63, at 285.

<sup>66</sup> C.V. WOODWARD, *supra* note 54, at 82.

<sup>67</sup> D. DONALD, *supra* note 56, at 202.



The fact — if it is a fact — that “anti-slavery advocates [abolitionists] increasingly became converts to the idea of human equality”<sup>68</sup> does not prove that they had significant impact on the framers. Woodward found that during the war years “[t]he great majority of citizens in the North still abhorred any association with abolitionists . . . .”<sup>69</sup> Senators Fessenden and Grimes, leading Republicans, held the “extreme radicals” in “abhorrence.”<sup>70</sup> Senator Edgar Cowan, a Pennsylvania Republican, ridiculed the notion that the “antipathy that never sleeps, that never dies, that is inborn, down at the very foundation of our natures” is “to be swept away by . . . reading half a dozen reports from certain abolitionist societies.”<sup>71</sup> The fact is, as David Donald concluded, that “[m]oderates had to check extreme Radical proposals or be defeated in the districts they represented.”<sup>72</sup> On the basis of a “scale” analysis, M.L. Benedict concluded that the Radicals “did not dominate Congress during the Reconstruction era,”<sup>73</sup> and that “the nonradicals had enacted their program with the sullen acquiescence of some radicals and over the opposition of many.”<sup>74</sup> Even a fervent radical, Thaddeus Stevens, excoriated Senator Charles Sumner for raising obstacles to passage of the amendment because it did not give Negroes the vote,<sup>75</sup> facing up to the fact that radicals would have to settle for less. Only a wishful thinker could extract from such materials the conclusion that the framers had “an ideal of human equality, an ideal they vigorously defended in Congressional debate and an ideal they successfully wrote into the nation’s fundamental law.”<sup>76</sup>

Cottrol chides me for “a too uncritical acceptance of the harsher views American historians have expressed . . . .”<sup>77</sup> My views were formed by immersion in the legislative history of the amendment, the primary source, and the historians I have cited merely confirm what I found there. Time and again Republicans attested that racism was an inescapable fact. George Julian, an Indiana Radical, deplored the “proverbial hatred” of Negroes; Senator Henry Lane of Indiana referred to the “almost ineradicable prejudice,” Shelby Cullom of Illinois to the “morbid prejudice,” Senator William Stewart of Nevada to the “nearly insurmountable” prejudice, James Wilson of Iowa to the “iron-cased prejudice” against blacks.<sup>78</sup> These were Republicans bent on protecting the civil rights of blacks. Senator Henry Wilson, a Massachusetts Radical, stated in the Senate in 1869, “There is not to-day a square mile in the United States where the advocacy of the equal rights and privileges of those colored men has not been in the past and is not now unpopular.”<sup>79</sup> While Cottrol pays tribute to “Berger’s often prodigious scholarship,” he finds it “is marred by an all too facile consideration of the materials he has developed.”<sup>80</sup>

<sup>68</sup> Cottrol, *supra* note 2, at 373.

<sup>69</sup> C.V. WOODWARD, *supra* note 54, at 73.

<sup>70</sup> R. BERGER, *supra* note 16, at 235.

<sup>71</sup> CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).

<sup>72</sup> D. DONALD, *THE POLITICS OF RECONSTRUCTION* 51–52 (1965).

<sup>73</sup> M. BENEDICT, *A COMPROMISE OF PRINCIPLE* 27 (1974).

<sup>74</sup> *Id.* at 210.

<sup>75</sup> A. AVINS, *supra* note 40, at 212.

<sup>76</sup> Cottrol, *supra* note 2, at 373.

<sup>77</sup> *Id.* at 366.

<sup>78</sup> R. BERGER, *supra* note 16, at 13. Senator John Sherman of Ohio stated, “we do not like negroes. We do not disguise our dislike.” Woodward, *Seeds of Failure in Radical Race Policy*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 128 (H. Hyman ed. 1966).

<sup>79</sup> CONG. GLOBE, 40th Cong., 3d Sess. 672 (1869).

<sup>80</sup> Cottrol, *supra* note 2, at 386.

The foregoing materials need no exegesis; they speak for themselves. If "ineradicable," "insurmountable," hatred of Negroes does not demonstrate a society hag-ridden by racism, language has lost its meaning. "What lies beneath the politics of the Reconstruction period, so far as it touched the Negro," wrote Russell Nye, "is the prevailing racist policy tacitly accepted by both parties and by the general public."<sup>81</sup> Cottrol's attempt to exorcise the racist influence, echoing that of his "perceptive" fellow activist, Aviam Soifer, simply exhibits a refusal to face up to indisputable facts.

### III. STATE SOVEREIGNTY

Another underlying factor that altogether escapes Cottrol's notice was the North's deep-seated attachment to State control of internal affairs, a factor that weighed heavily on Reconstruction politics. While the North was determined to balk the return to serfdom by the South's Black Codes, the eradication of inequality, as Vann Woodward remarked, required "a revolution for the North as well,"<sup>82</sup> a revolution, as has been noted, for which it was utterly unprepared. "The Radical leaders," Flack wrote, "were aware as any one of the attachment of a great majority of the people to the doctrine of States Rights . . . the right of the States to regulate their own internal affairs."<sup>83</sup> On the eve of the Civil War, Lincoln stated in his First Inaugural Address, "[t]he right of each State to order and control its own domestic institutions according to its own judgment exclusively is essential to the balance of power, on which the perfection and endurance of our political fabric depends."<sup>84</sup> At the outset Roscoe Conkling said in the Thirty-ninth Congress, "[t]he proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. It takes away a right which has been always supposed to inhere in the States . . . ."<sup>85</sup> Other Republicans were of the same mind. George Latham said Congress "has no right under the Constitution to interfere with the internal policy of the several States . . . ."<sup>86</sup> Bingham, a leader in the Negro cause, stated that "the care of the property, the liberty, and the life of the citizen . . . is in the States and not in the Federal Government. *I have sought to effect no change in that respect.*"<sup>87</sup> Such sentiments were accurately summarized by a sagacious observer of the contemporary scene, Justice Samuel Miller, in 1872, shortly after adoption of the fourteenth and fifteenth amendments:

we do not see in those amendments any purpose to destroy features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government . . . was essential to the perfect working of our complex form of government . . . .<sup>88</sup>

<sup>81</sup> Nye, *Comment on C.V. Woodward's Paper*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 151 (H. Hyman ed. 1966).

<sup>82</sup> C.V. WOODWARD, *supra* note 54, at 79.

<sup>83</sup> H. FLACK, *supra* note 19, at 68. Don Fernbacher observed a "widespread and tenacious resistance to the interventionism federalism aggressively embodied." D. FERNBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 581 (1978).

<sup>84</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2096 (1866). See R. BERGER, *supra* note 16, at 60-61.

<sup>85</sup> CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866).

<sup>86</sup> *Id.* at 1295-96.

<sup>87</sup> *Id.* at 1292 (emphasis added). For additional citations see R. BERGER *supra* note 16 at 61-63.

<sup>88</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 82 (1872).

Those domestic controls were safeguarded by the tenth amendment, and one who argues for their curtailment bears the burden of persuasion.

#### IV. CRUEL AND UNUSUAL PUNISHMENTS

The States' reservation of criminal law administration within their borders equally plays no role in Cottrol's argument that the "cruel and unusual punishments" clause struck down death penalties. Preliminarily, he emphasizes that Berger considers that the death penalty is "appropriate and desirable as a matter of policy,"<sup>89</sup> in which he is at odds with a leading opponent of death penalties, Hugo Bedau, who upbraids me for lack of candor in concealing my views respecting the morality of death penalties.<sup>90</sup> Apparently Cottrol would suggest that my alleged "policy" views, on which he dwells,<sup>91</sup> impeach my scholarly disinterestedness, although Bedau notes that death penalties have been defended "by secular saints . . . whose dispassionate interest in justice cannot reasonably be challenged."<sup>92</sup> Cottrol has yet to learn from Cardozo that "[n]ot all the precepts of conduct precious to the hearts of many of us are immutable principles of justice . . . ."<sup>93</sup> Unlike Cottrol, I have not carried the banner for this or the other cause; for forty-four years my overriding commitment has been to the integrity of the Constitution.

Hamilton assured the Ratifiers of the Constitution in *Federalist* No. 17 that "[t]here is one transcendent advantage belonging to the province of the State governments . . . the ordinary administration of criminal and civil justice."<sup>94</sup> Consequently, to read the "cruel and unusual" clause, adopted shortly thereafter, as depriving the States of power to enact death penalties calls for proof. The facts are indisputably to the contrary. The words had been borrowed from the English Bill of Rights of 1689;<sup>95</sup> for 100 years thereafter both England and the colonies kept death penalties in place,<sup>96</sup> evidence that they were not deemed to constitute "cruel and unusual punishments." This is conceded: "[l]ittle in the harsh world that was eighteenth century criminal justice suggested that the death penalty . . . was beyond the pale of what was then deemed cruel and unusual."<sup>97</sup> Cottrol also admits that there is "abundant evidence that the capital crimes of today would survive the scrutiny of the framers,"<sup>98</sup> and that "widespread existence of laws in the eighteenth century prescribing death" evidences that many contemporaries of the eighth amendment "believed the penalty necessary."<sup>99</sup> One might halt here, for the established rule is that a common law term must be given its accepted meaning.<sup>100</sup> Chief Justice Marshall stated that if a word was understood in a certain sense "when the

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<sup>89</sup> Cottrol, *supra* note 2, at 359 n.68. See also *infra* note 91.

<sup>90</sup> Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152, 1164 (1983).

<sup>91</sup> Cottrol, *supra* note 2, at 361; cf. *id.* at 380; see also *supra* note 89.

<sup>92</sup> H. BEDAU, *THE DEATH PENALTY IN AMERICA* 148-49 (2d ed. 1968).

<sup>93</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

<sup>94</sup> *THE FEDERALIST* No. 17, at 103 (A. Hamilton) (Mod. Lib. ed. 1937).

<sup>95</sup> 2 W. & M., ch. 2 (1689).

<sup>96</sup> R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 34-35, 44 (1982).

<sup>97</sup> Cottrol, *supra* note 2, at 360.

<sup>98</sup> *Id.* at 382.

<sup>99</sup> *Id.*

<sup>100</sup> R. BERGER, *supra* note 96, at 59-76.

Constitution was framed . . . the convention must have used it in that sense."<sup>101</sup> The common law definitions, Justice Story held, "are necessarily included as much as if they stood in the text . . ."<sup>102</sup> In fact, recognition of death penalties is writ large on the face of the Constitution. The companion fifth amendment prohibition of the taking of life except with due process confirms that life may be taken. So too the First Congress, which enacted the eighth amendment, made various offenses punishable by death in the Act of April 30, 1790,<sup>103</sup> unmistakable evidence that the draftsmen did not consider "cruel and unusual" a bar to capital punishment.

These historical facts are not disputed by Cottrol. Instead, he identifies his own horror of death penalties with the "evolved American sense of justice."<sup>104</sup> But, wrote Robert Sherrill, "[c]apital punishment is very popular all over the country."<sup>105</sup> And "[o]pponents of the death penalty, acknowledging the overwhelming public, political and legal support for the death penalty, are altering their tactics, saying they expect it to be a long time before public attitudes can be changed."<sup>106</sup> Such facts — citations can be multiplied — undermine Cottrol's conclusion that "[i]f the cruel and unusual punishment clause is to have any meaning, it must take that meaning from society's changed circumstances, from both evolved needs and sentiments,"<sup>107</sup> let alone that that determination is for the people, not the courts.

Cottrol criticizes my "methodology" because it is "fundamentally at odds with beliefs, long nurtured by the Court, of an evolving Constitution adaptable to a changing social environment . . ."<sup>108</sup> It is idle to appeal to the Court for legitimation of its challenged practices. The question whether the Court is authorized to "adapt" the Constitution is not answered by his assertion that the Framers were "fully mindful" that judges "likely would shape the demands of [the cruel and unusual] clause to changing circumstances."<sup>109</sup> That assertion founders on Hamilton's assurance that

[u]ntil the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding . . . and *no presumption*, or even knowledge, of their sentiments, *can warrant their representatives in a departure from it*, prior to such an act.<sup>110</sup>

<sup>101</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

<sup>102</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). So deeply anchored was this presupposition that when the Framers employed the word "treason" they defined it in order to obviate some common-law excesses.

<sup>103</sup> Ch. 9, § 1, 1 Stat. 112.

<sup>104</sup> Cottrol, *supra* note 2, at 381.

<sup>105</sup> Sherrill, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine) at 80, col. 1. A poll by Media General Associated Press reports that "84% of the American public currently supports the death penalty for murder." Boston Globe, Jan. 19, 1985, at 5, col. 1.

<sup>106</sup> N.Y. Times, Aug. 19, 1985, at A13, col. 1. A "1985 California poll found 83 percent of respondents in favor of the death penalty, with only 15 percent opposed." N.Y. Times, Jan. 17, 1986 at A31, col. 1.

<sup>107</sup> Cottrol, *supra* note 2, at 386.

<sup>108</sup> *Id.* at 354 (emphasis added). Justice Black dismissed "rhapsodical strains about the duty of th[e] Court to keep the Constitution in tune with the times . . . . The Constitution makers knew the need for change and provided for it" by the amendment process of Article V. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

<sup>109</sup> Cottrol, *supra* note 2, at 386.

<sup>110</sup> THE FEDERALIST No. 78, at 509 (A. Hamilton) (Mod. Lib. ed. 1937) (emphasis added). In the First Congress, Elbridge Gerry, a prominent Framer and erstwhile President of the Continental

It is vain to invoke the fact that prior to 1787 State courts had held legislation "void, in conflict with the state's fundamental law," that the Framers were concerned that the legislature "would overstep its bounds," that the courts would "limit the legislative excess that Hamilton feared."<sup>111</sup> Were such cases in conflict with Hamilton's assurance, they would have to yield. In fact, however, Cottrol proves no more than a judicial duty to police constitutional boundaries, to check action in *excess of delegated power*. That furnishes no authority for the exercise of judicial power beyond that line. Justice James Iredell, a preeminent Founder, drew the distinction in *Ware v. Hylton*.<sup>112</sup> Referring to constitutional limitations on legislative power, he declared,

Beyond these limitations . . . their acts are void, because they are not warranted by the authority given. But *within* them . . . the Legislatures only exercise a discretion expressly confided to them by the constitution . . . . It is a discretion *no more controllable* . . . by a Court . . . than a judicial determination is by them . . . .<sup>113</sup>

In short, power to curb legislative excesses does not authorize a judicial takeover of legitimate legislative, to say nothing of amendment, functions.

Next Cottrol argues that "[t]he fourteenth amendment raises serious questions about discriminatory application of the death penalty," and that "Berger offers a limited view of the equal protection clause."<sup>114</sup> That view was based on proof that: (1) the framers refused to ban *all* discrimination, and (2) the equal protection clause did indeed have "limited" goals.<sup>115</sup> As was said by Robert Bork:

The words are general but surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in schooling . . . I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed.<sup>116</sup>

Let it be assumed that "the administration of the death penalty has been rife with discrimination," "severely tainted by racism,"<sup>117</sup> that does not meet the proof that the framers left criminal administration by the States untouched. Cottrol asserts that the "fourteenth amendment raises serious questions about discriminatory application of the death penalty."<sup>118</sup> Here as elsewhere Cottrol simply assumes, contrary to the fact, that

Congress, said, "[t]he people" have directed a "particular mode for making amendments, which we are not at liberty to depart from." A power to alter "would render the most important clause of the Constitution nugatory." 1 ANNALS OF CONG. 503 (J. Gales ed. 1789). The Court itself has rejected the notion that the Constitution may be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made." *McPherson v. Blacker*, 146 U.S. 1, 36 (1892). See also *Hawke v. Smith*, 253 U.S. 221, 227 (1920).

<sup>111</sup> Cottrol, *supra* note 2, at 361-63.

<sup>112</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

<sup>113</sup> *Id.* at 266.

<sup>114</sup> Cottrol, *supra* note 2, at 360.

<sup>115</sup> See *supra* text accompanying notes 45-49, 54-56.

<sup>116</sup> Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971). Contrast with this Cottrol's statement, "the amendment's general language was designed to allow for an evolution of approach . . ." Cottrol, *supra* note 2, at 375.

<sup>117</sup> Cottrol, *supra* note 2, at 380-381.

<sup>118</sup> *Id.* at 360.

all discrimination was banned, and makes no attempt to meet the evidence to the contrary.

Justice Powell had pointed out in *Furman v. Georgia*<sup>119</sup> that "[t]he same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms,"<sup>120</sup> for our jails are crammed with black prisoners. He justly observed that

[t]he root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties . . . . [M]ost of those who commit crimes happen to be underprivileged. The basic problem results not from penalties imposed for criminal conduct but from social and economic factors that have plagued humanity since the beginning of recorded history . . . .<sup>121</sup>

This view was adopted by the Court in *Pulley v. Harris*<sup>122</sup> by a vote of 7 to 2, holding that the Constitution does not require a special review to insure that a death sentence is in line with other sentences imposed in the State for similar crimes. "Any capital sentencing scheme," it said, "may occasionally produce aberrational outcomes."<sup>123</sup> So it is not Berger alone who "rejects the view that systematic discrimination in the application of the death penalty is proper cause for the Court's concern."<sup>124</sup> Cottrol is free to differ with the Court, but his failure to notice that it recently held against him marks him as a propagandist rather than a scholar. His credibility is further weakened by his misleading attempt to suggest that the materials I set forth are merely the views of Berger. Thus he writes, "*Berger argues*, the Court has severely misread public sentiment on the death penalty."<sup>125</sup> When *Furman* was followed by "a virtual stampede of State reenactments"<sup>126</sup> Justices Stewart, Powell and Stevens acknowledged that "it is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction."<sup>127</sup> And Cottrol admits that "Berger is correct in his assertion that this action furnishes strong evidence of public support for capital punishment,"<sup>128</sup> so that the "Berger argues" language exhibits an attempt to cast doubt on facts that he ultimately admits.

<sup>119</sup> 408 U.S. 238 (1972).

<sup>120</sup> *Id.* at 447 (Powell, J., dissenting).

<sup>121</sup> *Id.*

<sup>122</sup> 465 U.S. 37 (1984).

<sup>123</sup> *Id.* at 54.

<sup>124</sup> Cottrol, *supra* note 2, at 380. A striking example of Cottrol's own "myopia" is his comment that "[b]enefit of clergy was, despite its inherent class discrimination, one device that permitted courts to spare lives." *Id.* at 382. What was this but arrant discrimination in favor of those who had learned to read?

<sup>125</sup> *Id.* at 361 (emphasis added).

<sup>126</sup> J. ELY, *DEMOCRACY AND DISTRUST* 65 (1980).

<sup>127</sup> *Gregg v. Georgia*, 428 U.S. 153, 179 (1976).

<sup>128</sup> Cottrol, *supra* note 2, at 385. Another example of Cottrol's negligent misstatement: "Berger realizes that it is perhaps too late in the constitutional day to rest a defense of the state's right to kill on an attack on the incorporation doctrine," *id.* at 359, when in fact I devoted a chapter to that threshold question and concluded that incorporation had no constitutional footing. R. BERGER, *supra* note 96, at 10-28. It is never too late to challenge an unconstitutional doctrine. See *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938).

Next Cottrol turns to "a sense of the processes the Constitution's protagonists believed would be employed by the Court in interpreting the Constitution,"<sup>129</sup> which he would derive from the objections of "Brutus," an opponent of its adoption. He recognizes that although the objections of an opponent "cannot supply dispositive proof of legislative intent, they are nonetheless valuable sources . . . [A]ssurances in meaning, are more often than not traceable to attempts to answer charges raised by critics."<sup>130</sup> Such was Hamilton's response to "Brutus" in his articles on the judiciary, what Cottrol labels as "a somewhat disingenuous attempt on Hamilton's part to make the case for the Court's powers to a public already suspicious of the role of lawyers and courts in American society."<sup>131</sup> Hamilton, writes Cottrol, "was attempting to persuade opponents and the public at large of the desirability of the new Constitution and that . . . the proposed judicial branch would not constitute a threat to the liberties of the people . . ."<sup>132</sup>

Instead of looking to "Brutus," Cottrol would have done better to study Hamilton's "assurances," confessedly designed to sway votes for adoption. In No. 78 Hamilton wrote, "the judiciary is beyond comparison the weakest of the three departments,"<sup>133</sup> and "next to nothing,"<sup>134</sup> hardly the branch to whom revision of the Constitution would be entrusted.<sup>135</sup> He rejected the argument that "the courts, on the *pretence* of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."<sup>136</sup> In No. 80 he advocated "an authority . . . to over-rule such [state laws] as might be in *manifest* contravention of the articles of union."<sup>137</sup> In No. 81 he rejected the argument that the Court would be given a power of construing laws "according to the *spirit* of the Constitution" which would enable it "to mould them into whatever shape it may think proper . . ."<sup>138</sup> And he declared that "judiciary encroachments on the legislative authority" would be checked by "the power of instituting impeachments."<sup>139</sup> Cottrol agrees that Hamilton "expressed the view that the Court should be bound to adhere strictly to the law without substituting the private predilections of justices for the demands of the law."<sup>140</sup> He thinks to dispose of Hamilton by labelling him "disingenuous." Hamilton's "suspicious" listeners were not required to psychoanalyze his motives; "disingenuous" or not, his assurances could be taken at face value. To repudiate such representations, wrote Justice Story, would constitute a "fraud" on the people.<sup>141</sup>

Cottrol further argues that "the original understanding of the Constitution included an ability to exercise common-law reasoning processes," and "to use familiar tools of

<sup>129</sup> Cottrol, *supra* note 2, at 361 (emphasis added).

<sup>130</sup> *Id.* at 362.

<sup>131</sup> *Id.* at 363.

<sup>132</sup> *Id.*

<sup>133</sup> THE FEDERALIST No. 78, at 504 (A. Hamilton) (Mod. Lib. ed. 1937).

<sup>134</sup> *Id.* at 504 n.\*, (quoting C. MONTESQUIEU, THE SPIRIT OF THE LAWS vol. 1, at 186 (1748)).

<sup>135</sup> Because of colonial experience judges were viewed with "aversion and distrust," so that Justice James Wilson, a leading Framers, counseled in 1791 that it "is high time that we should chastise our prejudices." 1 THE WORKS OF JAMES WILSON 292 (R. McCloskey ed. 1967).

<sup>136</sup> THE FEDERALIST No. 78, *supra* note 133, at 507 (emphasis added).

<sup>137</sup> *Id.* No. 80 at 516 (emphasis added).

<sup>138</sup> *Id.* No. 81 at 523-24.

<sup>139</sup> *Id.* at 526.

<sup>140</sup> Cottrol, *supra* note 2, at 363.

<sup>141</sup> "If the Constitution was ratified under the belief sedulously propagated on all sides, that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its power?" 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1084 (5th ed. 1905).

judicial reasoning."<sup>142</sup> Yet this champion of the "familiar tools" ignores the centuries-old rule that common-law terms are to be given the content they had at common law,<sup>143</sup> e.g., death penalties were not within the compass of "cruel and unusual punishments." And he ignores another "common-law" canon, going back at least to Francis Bacon and reiterated by Justice James Wilson, that the duty of the courts is to construe, not to make, law.<sup>144</sup> Then too, the 1787 Framers had rejected judicial participation in a Council of Revision that would advise the President in exercising the veto of legislation on the ground that judges had no special competence to deal with policy matters.<sup>145</sup> This rejection, Edward Corwin concluded, proceeded from the principle that "the power of *making* ought to be kept distinct from that of *expounding* the laws."<sup>146</sup> Throughout the several conventions, judicial review was constantly couched in terms of expounding, never of making, the law.<sup>147</sup> Again, Cottrol asserts that the Constitution "left room for judicial discretion, for adapting law to . . . changing circumstances,"<sup>148</sup> when in fact the Founders had "a profound fear of judicial independence and discretion."<sup>149</sup>

He considers that both *Marbury v. Madison*<sup>150</sup> and *McCulloch v. Maryland*<sup>151</sup> exemplify "a flexible view of the Constitution and the Court's interpretive authority . . ."<sup>152</sup> *Marbury* invalidated Congress' attempt to enlarge the Court's "original jurisdiction," an effort that should have engaged its sympathy and more "flexible" response. *McCulloch*, Marshall underscored, did not in the slightest degree claim power to expand federal jurisdiction; and he categorically stated that the courts had no "right to change that instrument."<sup>153</sup> It is indeed necessary to recognize that "common-law processes are inherent in constitutional interpretation,"<sup>154</sup> but Cottrol would pick and choose among them. He acknowledges "that a too pliable Constitution is no constitution at all . . ."<sup>155</sup> Certainly the

<sup>142</sup> Cottrol, *supra* note 2, at 363. See also *id.* at 387.

<sup>143</sup> See *supra* text accompanying notes 100–102.

<sup>144</sup> F. BACON, SELECTED WRITINGS 138 (Mod. Lib. ed. 1955). Justice Wilson wrote that the judge "will remember, that his duty and his business is, not to make the law, but to interpret and apply it." 2 THE WORKS OF JAMES WILSON 502 (R. McCloskey ed. 1967). See also *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874); *Luther v. Borden*, 48 U.S. (7 How.) 1, 41 (1849).

<sup>145</sup> 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 73 (1911); 1 *id.* at 97–98.

<sup>146</sup> E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 42 (1914).

<sup>147</sup> See R. BERGER, CONGRESS V. THE SUPREME COURT index "expounding" (1969). In *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 47 (1793), a landmark assertion of the power of judicial review, Judge Henry stated: "The judiciary from the nature of the office . . . could never be designed to determine upon the equity, necessity, or usefulness of a law . . . [N]ot being chosen immediately by the people, nor being accountable to them . . . they do not, and ought not, to represent the people in framing or repealing any law."

<sup>148</sup> Cottrol, *supra* note 2, at 362.

<sup>149</sup> G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 298 (1969); see also *id.* at 304. Judge William Cranch of the Circuit Court for the District of Columbia stated in the preface to the first volume of the Supreme Court's decisions that "[i]n a government which is emphatically stiled a government of laws, the least possible range ought to be left for the discretion of the judge." 5 U.S. (1 Cranch) iii (1803). Without the common law, Chancellor Kent declared, "the courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations." 1 J. KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858).

<sup>150</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>151</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>152</sup> Cottrol, *supra* note 2, at 364.

<sup>153</sup> R. BERGER, *supra* note 16, at 377.

<sup>154</sup> Cottrol, *supra* note 2, at 387.

<sup>155</sup> *Id.*



Framers never contemplated that those processes could do "violence to the framers' intentions."<sup>156</sup> Mark Tushnet, Cottrol's counsellor,<sup>157</sup> considers the view that "we are indeed better off being bound by the dead hand of the past than in being subjected to the whims of willful judges trying to make the Constitution live" must be considered "fairly powerful."<sup>158</sup>

Turning to the fourteenth amendment, Cottrol considers that its framers contemplated that courts "would fashion constitutional doctrine," and that they "would develop doctrine, informed but not shackled by the necessarily narrow focuses of the drafters."<sup>159</sup> He is intoxicated by his own rhetoric. In fact, courts were in very ill repute because of the *Dred Scott*<sup>160</sup> decision, detestation of which still ran high.<sup>161</sup> Distrust of the Court<sup>162</sup> accounts for the fact that enforcement of the fourteenth amendment was entrusted by section 5 to Congress, not the Court.<sup>163</sup> Bingham complained that of late the Court "had 'dared to descend from its high place in the discussion and decision of purely judicial questions to the settlement of political questions which it has no more right to decide for the American people than has the Court of St. Petersburg.'"<sup>164</sup> Suffrage and segregation were precisely such political decisions as the framers did not mean to leave to the Court; and they did not scruple to withdraw one "political" case from the bosom of the Court in *Ex parte McCordle*.<sup>165</sup>

The "original intention" of the Framers is at the heart of the ongoing debate as to the judicial role, and on that issue Cottrol lapses into utter confusion. He declares that "the intentions of original framers must be given due effect";<sup>166</sup> presumably "due" is the joker which enables him to argue that the courts may "develop doctrine, informed but not shackled by the necessarily narrow focuses of the drafters."<sup>167</sup> Nevertheless, he opines, "the Court's thwarting of [the framers'] fundamental intentions" is not "justi-

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 353 n.\*.

<sup>158</sup> Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 787 (1983).

<sup>159</sup> Cottrol, *supra* note 2, at 365, 354-55.

<sup>160</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>161</sup> Senator Sumner even sought to bar the placement of Chief Justice Taney's bust in the Supreme Court Chamber — the customary memorial — and insisted that his name should be "hooted down in the pages of history." D. DONALD, *supra* note 56, at 193. In the House, Stevens condemned "the infamous sentiment that damned the late Chief Justice to everlasting fame: and, I fear, to everlasting fire." CONG. GLOBE, 39th Cong., 1st Sess., 75 (1865). Of *Dred Scott*, Senator Jacob Howard, a participant in the debates of the 39th Congress, said in 1870, "It was a partisan, political decision, the purpose of which was to establish by judicial decision . . . for all time to come the legality, the rightfulness, and even the piety of slavery . . . . The comment made upon that great wrongful judicial decision is to be seen in the dreadful war through which we have passed . . . ." CONG. GLOBE, 41st Cong., 2d Sess. 1543 (1870).

<sup>162</sup> "The Radicals did not trust the judiciary in general and the Supreme Court in particular . . . ." R. HARRIS, *THE QUEST FOR EQUALITY* 53-54 (1960). "Radical Republicans sought to deny the postwar Court the power to review congressional Reconstruction." M. KELLER, *AFFAIRS OF STATE* 73 (1977).

<sup>163</sup> See *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

<sup>164</sup> 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 462 (1971) (emphasis added).

<sup>165</sup> 74 U.S. (7 Wall.) 506 (1868). See R. BERGER, *supra* note 96, at 169 n.65.

<sup>166</sup> Cottrol, *supra* note 2, at 354.

<sup>167</sup> *Id.* at 354-55.

fied."<sup>168</sup> Even so, he complains that "Berger would limit the Court's eighth amendment analysis to the sensibilities of the framers."<sup>169</sup> Cottrol argues that:

[t]o give *full effect to the intentions* of the framers of the fourteenth amendment, the Court must go beyond the details of whether or not the amendment was specifically designed to confer this right or protect that privilege and inquire into whether or not a state's practice is inconsistent with the concepts of citizenship and equal protection that were the central concern of those who authored the constitutional revolution in race relations and federalism in the years following the Civil War.<sup>170</sup>

Is the framers' exclusion of suffrage and segregation from the amendment a mere "detail" or a "fundamental intention" that is not to be "thwarted"? Bickel wrote that "[t]he Framers of the Fourteenth Amendment explicitly rejected the option of an open-ended grant of power to Congress freely to meddle with the conditions within the States, so as to render them equal in accordance with Congress's own notions."<sup>171</sup> Still less was that option given to the Court.

But Berger, Cottrol relents, plays "an important role . . . in reminding an all too often result-oriented bench, bar, and public of the need to retain continuity with original intentions."<sup>172</sup> The problem, as he sees it, is "to develop limits that prevent those [common-law] processes from doing violence to the framers' intentions."<sup>173</sup> The Court's unremitting expansion of its law making and constitutional revision makes a call for its development of "limits" delusory. To expect "self-restraint" from the Court is like asking a greyhound not to take out after a rabbit. "The inability of any of the noninterpretivist philosophies to control the judge," Judge Robert Bork observes, "to prevent him or her from imposing merely personal or class-bound sympathies as the fundamental and unchallengeable law of the nation, is certainly a flaw so damaging as to be classified fatal."<sup>174</sup> Until activists set out to bolster the decisions of the Warren Court, "there was never any doubt that the document was to be construed so as to give effect, as nearly as possible, to the intentions of those who made it."<sup>175</sup> Let me counsel Cottrol to study and ponder on Judge Bork's Foreword.<sup>176</sup>

<sup>168</sup> *Id.* at 365.

<sup>169</sup> *Id.* at 381.

<sup>170</sup> *Id.* at 375 (emphasis added).

<sup>171</sup> A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 48 (1978).

<sup>172</sup> Cottrol, *supra* note 2, at 386.

<sup>173</sup> *Id.* at 387.

<sup>174</sup> Bork, *Foreword* to G. McDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* at viii (1985).

<sup>175</sup> *Id.* at v. The Court has "uninterruptedly" turned to the original intention. tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CALIF. L. REV. 399, 399 (1939). Henry Monaghan insists that "any theory of constitutional interpretation which renders unimportant or irrelevant questions as to the original intent, so far as that intent can be fairly discerned, is not, given our tradition, politically or intellectually defensible." Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 124 (1978). Respect for the original intention is deeply rooted in the common law and in our history. Berger, *Original Intention In Historical Perspective*, 54 GEO. WASH. L. REV. 101 (1986).

<sup>176</sup> See *supra* note 174.